Supreme Court, U. S.
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No. 77-290

In the Supreme Court of the United States

OCTOBER TERM, 1977

ORLIN GENTRY COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the Court of Claims erroneously held that his claim was barred by the statute of limitations, 28 U.S.C. 2501.

The facts are set forth in the Court of Claims' opinion (Pet. App.). Petitioner was separated involuntarily from the United States Army on June 10, 1970, on the ground of permanent total disability.[1] On May 8, 1975, he wrote a letter to the Clerk of the Court of Claims, asking that the court reverse the adverse determination of the Army

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[1]Petitioner had lost an eye in 1953 during the Korean conflict but previously had been given a waiver of his disability that had allowed him to remain on active duty.

Physical Evaluation Board. The Clerk advised him that he needed to file a formal petition in conformity with court rules and provided him with a copy of those rules. Subsequently, petitioner wrote additional letters to the Clerk (on May 22, 1975) and the Chief Judge (on July 26, 1976), seeking reinstatement and other relief, but he did not file a petition in reasonable compliance with court rules until December 22, 1976. The Court of Claims declined to consider that petition, citing the six-year statute of limitations set forth in 28 U.S.C. 2501.

That decision is correct and does not merit further review. As the Court of Claims noted, petitioner made no effort to file a proper petition for review until 19 months after the Clerk of the Court of Claims first advised him that a formal petition was required. Although the Court of Claims made allowance for the fact that petitioner was a layman and thus not accustomed to the formalities of court rules, it nonetheless concluded that his neglect was unjustified (Pet. App. 3):

> Looking at the matter in the light most favorable to plaintiff since he is not a lawyer and is representing himself, and has an honorable service record, he had sufficient time and was on notice of what he had to do to present a claim which would be recognized by the court and would be answerable by defendant. Plaintiff has given no reason to excuse this delay, and we see no basis for tolling the statute and allowing this tardy claim to be considered on the merits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11

3. The record shows that plaintiff has worked almost continuously since 1970 for reinstatement and continuation on active duty, who offered early to serve at half-pay if need be which was ignored, who now strives "For such other and further relief,as to the Court may seem just and proper to include; promotions, all pay and allowances, full tenure, interest, costs and damages."

4. Although the US Court of Claims was very understanding and courteous, sending their rule book on the "proper" way to write a petition, they did not offer to send me, a layman an example of a proper petition until I saw a news article on SFC Charles E. CRAFTs' case which was basic in similarity to mine, this news article on SFC CRAFT was dated Nov 29, 1976.

5. Surely the US Court of Claims is under "no legal obligations" to furnish an example of a peition to even a long service veteran, especially without his request, or even to inform a laymen that such examples are available, unless they are asked for. After reading of SFC CRAFTs' case on Nov 29, 1976, I wrote to the US Court of Claims regarding this case, I was informed that I could receive a copy at a very minim fee. Shortly thereafter I received a copy of SFC CRAFTs' petition, using this as an example I wrote mine, which was filed on Wed., the 22nd of December 1976.

Very respectfully submitted,

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